Amex Card Services Company, a subsidiary of American Express Travel Related Services Company, Inc., a subsidiary of American Express Company *and* Erandi Acevedo, Jennifer Flynn, and Jonathan Longnecker. Case 28–CA–123865

November 10, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

Upon a charge filed March 6, 2014, by Erandi Acevedo, Jennifer Flynn, and Jonathan Longnecker, the General Counsel issued a complaint and notice of hearing on May 22, 2014, alleging that the Respondent has been violating Section 8(a)(1) of the Act by: (1) at all material times, maintaining the rules set forth in the documents entitled "American Express Company Employment Arbitration Policy" and "New Hire Employment Arbitration Policy Acknowledgement Form"; and (2) since about February 27, 2014, enforcing the rules in those documents by maintaining a cause of action in the United States District Court of the District of Arizona seeking to compel individual arbitration of wage and hour claims by its employees.

On October 10, 2014, the Respondent, the Charging Parties, and the General Counsel filed a joint motion to waive a hearing and a decision by an administrative law judge and to transfer this proceeding to the Board for a decision based on a stipulated record. On March 18, 2015, the Board granted the parties' joint motion. Thereafter, the Respondent and the General Counsel filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

On the entire record and briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Phoenix, Arizona, has been engaged in providing credit card services. In conducting its operations during the 12-month period ending March 6, 2014, the Respondent purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Arizona, and the Respondent derived gross revenues in excess of $100,000. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

The Charging Parties are former employees of the Respondent at its call center facility in Phoenix, Arizona. Erandi Acevedo was employed by the Respondent from approximately June 18, 2012, to October 10, 2013, Jennifer Flynn from approximately September 4, 2012, to September 17, 2013, and Jonathan Longnecker from approximately September 17, 2012, to September 17, 2013.

At all material times, the Respondent has maintained the "American Express Company Employment Arbitration Policy" (the Policy) and has required new hires to sign a document entitled the "New Hire Employment Arbitration Policy Acknowledgement Form" (the Form) as a condition of their employment. By signing the Form, each employee acknowledges receipt of the Policy and agreement to its terms. In its opening paragraph, the Form states, "I understand that arbitration is the final and exclusive forum for the resolution of all employment-related disputes between American Express and me that are based on a legal claim." The final paragraph before the employee's signature reads in its entirety: "I agree to submit any and all employment [-]related disputes based on a legal claim to arbitration, and agree to waive my right to trial before a judge or jury in federal or state court in favor of arbitration under the Policy."

The Policy applies to all employees hired since June 1, 2003, and to employees hired prior to June 1, 2003, who did not opt out of coverage.[2] The Charging Parties signed the Form on the first day of their employment.

The 14-page Policy states in relevant part:

- "The agreement between each individual and American Express to be bound to the Policy creates a contract requiring both parties to resolve all employment-related disputes that are based on a legal claim through final and binding arbitration. Arbitration is the exclusive forum for the resolution of such disputes, and the parties mutually waive their right to a trial before a judge or jury in federal or state court in favor of arbitration under the Policy." [Jt. Exh. 2, sec. II.]

[1] Member Miscimarra is recused and has taken no part in the consideration of this case.

[2] The Respondent does not argue that the opt-out provision makes the Policy lawful with respect to employees hired before June 1, 2003. In any event, that argument would lack merit for the reasons stated in *On Assignment Staffing Services*, 362 NLRB No. 189 (2015).

- "All claims subject to arbitration under this Policy **MUST** be submitted on an individual basis. **THERE SHALL BE NO RIGHT OR AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED ON A CLASS OR COLLECTIVE BASIS** . . . . No party subject to this Policy shall have any right to participate in a representative capacity or as a member of a class of claimants in a court of law pertaining to any claims subject to arbitration." [Id., sec. II,D.]

- "Any claim under the National Labor Relations Act" is not covered. [Id., sec. II,C.]

- The Policy "does not preclude an individual from filing a claim or charge with a governmental administrative agency with independent statutory authority to pursue an enforcement action, such as the National Labor Relations Board . . . ." [Id., sec. II,E.]

Like the Policy, the Form states that arbitration is the final and exclusive forum for the resolution of all employment-related disputes, that the employee "shall have no right or authority for any claim to be arbitrated on a class action basis," and that he or she "will not have the right to participate in a representative capacity or a member of any class of claimants in a court of law pertaining to any claims subject to arbitration." The Form explains that "the employment related disputes subject to arbitration under the Policy include any claims arising under any federal, state or local statute, regulation or common law doctrine regarding or relating to employment discrimination, terms and conditions of employment, or termination of employment (and any future additions, changes or amendments to those laws), including not limited to: [11 laws]." Unlike the Policy, the Form does not specify that claims under the NLRA are exempt or that employees have the right to file a claim or a charge with a governmental administrative agency.

Since at least February 27, 2014, the Respondent has enforced its arbitration policy by moving to compel individual arbitration in a cause of action brought by five former employees, including the Charging Parties, in the United States District Court for the District of Arizona, asserting claims under the Fair Labor Standards Act. On May 28, 2014, the court granted the Respondent's motion and dismissed the action without prejudice. *Longnecker v. American Express Co.*, No. 2:14-cv-0069-HRH (D. Ariz. 2014).

B. Discussion

The Board held in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and reaffirmed in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 1 (2014), enf. denied __ F.3d __ (5th Cir., Oct. 26, 2015), that an employer violates Section 8(a)(1) "when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." Additionally, an employer violates Section 8(a)(1) if employees would reasonably believe that its arbitration policy interferes with their ability to file a Board charge or to access the Board's processes. *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). And if an employer's arbitration policy is unlawful, the Board will find that the employer also violated Section 8(a)(1) by enforcing the policy. *Murphy Oil*, 361 NLRB No. 72, slip op. at 19 (citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16–17 (1962), and *Republic Aviation Corp.*, 324 U.S. 793 (1945)).

Here, we find that the Respondent violated Section 8(a)(1) by maintaining and enforcing the Policy and the Form (collectively, the Respondent's arbitration policy). First, we find that the Respondent's arbitration policy is facially unlawful under *D. R. Horton* and *Murphy Oil,* supra. Like the policies in those cases, the Respondent's arbitration policy requires employees, as a condition of their employment, to submit their employment-related legal claims to individual arbitration, thereby compelling employees to waive their Section 7 right to pursue such claims through class or collective action in all forums, arbitral and judicial. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 1; *D. R. Horton*, 357 NLRB No. 184, slip op. at 1.[3]

Second, we find that the Respondent's arbitration policy is also unlawful because employees would reasonably believe that it waived or limited their right to file a charge with the Board or to access the Board's processes. Although the Policy states that "[a]ny claim under the

[3] We find no merit in the Respondent's argument that the maintenance allegation is barred by Sec. 10(b) because the Charging Parties signed the arbitration policy more than 6 months before filing a charge. We reject this contention because the Respondent continued to maintain the unlawful policy throughout the 6-month period preceding the filing of the charge. The Board has long held under these circumstances that maintenance of an unlawful workplace rule, such as the Respondent's arbitration policy, constitutes a continuing violation. See *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 & fn. 6 (2015); and *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 & fn. 7 (2015).

National Labor Relations Act" is not covered, and that the Policy "does not preclude an individual from filing a claim or a charge with a governmental administrative agency . . . such as the National Labor Relations Board," the Form contains no such exceptions. When the Policy and the Form are read together, it is at best ambiguous whether employees retain the right to file a charge with the Board or to access the Board's processes. "[A]ny ambiguity in the rule must be construed against the Respondent as the promulgator of the rule." *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Moreover, the Form is drafted as a complete agreement to be signed by the employee; in it, the employee acknowledges receipt of the Policy, but it does not incorporate the Policy in its operative language, which expressly covers "all employment-related disputes," without limitation. Therefore, the Respondent's arbitration policy also violates Section 8(a)(1) because employees would reasonably believe that it interferes with their ability to file a Board charge or to access the Board's processes. See *U-Haul Co. of California*, 347 NLRB at 377–378.[4]

Third, because we find that the Respondent's arbitration policy is unlawful, we also find that the Respondent violated Section 8(a)(1) by enforcing the arbitration policy through its motion to compel individual arbitration in the cause of action brought by the Charging Parties and two other former employees in the United States District Court for the District of Arizona. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 19.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts them from filing charges with the National Labor Relations Board or to access the Board's processes, and by maintaining and/or enforcing a mandatory arbitration agreement under which employees are compelled, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Consistent with our decision in *Murphy Oil*, supra at 21, and the Board's usual practice in cases involving unlawful litigation, we shall order the Respondent to reimburse the plaintiffs for all reasonable expenses and legal fees, with interest,[5] incurred in opposing the Respondent's unlawful motion in United States District Court to compel individual arbitration of their collective FLSA action. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" and "any other proper relief that would effectuate the policies of the Act."). We shall also order the Respondent to rescind or revise its arbitration policy, to notify employees and the district court that it has done so, and to inform the district court that it no longer opposes the plaintiffs' claims on the basis of the unlawful arbitration policy.

ORDER

The National Labor Relations Board orders that the Respondent, Amex Card Services Company, a subsidiary of American Express Travel Related Company, Inc., a subsidiary of American Express Company, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration policy that employees reasonably would believe bars or restricts employees' right to file charges with the National Labor Relations Board or to access the Board's processes.

(b) Maintaining and/or enforcing a mandatory arbitration policy that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

[4] Having found that employees would not reasonably view the Respondent's arbitration policy as providing unrestricted access to the Board, and, by inference, to other administrative agencies, we necessarily reject any argument by the Respondent that its arbitration policy is distinguishable from the policies in *D. R. Horton* and *Murphy Oil*, supra, and lawful, because it permits such access. We need not address here whether an arbitration policy that, in fact, permitted administrative-agency access would be lawful under the rationale of *D. R. Horton* and *Murphy Oil*, an issue that remains to be decided by the Board in an appropriate case.

[5] Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses."), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the "American Express Company Employment Arbitration Policy" (the Policy) and the "New Hire Employment Arbitration Policy Acknowledgement Form" (the Form) in all of their forms, or revise them in all of their forms to make clear to employees that the Policy and the Form do not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that they do not restrict employees' right to file charges with the National Labor Relations Board or to access the Board's processes.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the Policy and the Form in any form that the Policy and the Form have been rescinded or revised and, if revised, provide them a copy of the revised documents.

(c) Notify the United States District Court for the District of Arizona that it has rescinded or revised the unlawful mandatory arbitration policy upon which it based its motion to compel individual arbitration of Erandi Acevedo's, Jennifer Flynn's, Jonathan Longnecker's, and their coplaintiffs' collective action, and inform the court that it no longer opposes the plaintiffs' action on the basis of the unlawful arbitration policy.

(d) In the manner set forth in the remedy section of this decision, reimburse the plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motion to compel individual arbitration.

(e) Within 14 days after service by the Region, post at its Phoenix, Arizona facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix" to all current employees and former employees employed by the Respondent at any time since February 27, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 10, 2015

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration policy that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL NOT maintain and/or enforce a mandatory arbitration policy that requires our employees, as a condition of employment, to waive the right to maintain class

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the "American Express Company Employment Arbitration Policy" (the Policy) and the "New Hire Employment Arbitration Policy Acknowledgement Form" (the Form) in all of their forms, or revise them in all of their forms to make clear that the Policy and the Form do not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that they do not restrict your right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the Policy and the Form in any of their forms that the Policy and the Form have been rescinded or revised and, if revised, WE WILL provide them a copy of the revised documents.

WE WILL notify the court in which Erandi Acevedo, Jennifer Flynn, and Jonathan Longnecker and their two fellow plaintiffs filed their collective lawsuit that we have rescinded or revised the unlawful arbitration policy upon which we based our motion to compel individual arbitration, and WE WILL inform the court that we no longer oppose the plaintiffs' claim on the basis of that agreement.

WE WILL reimburse Acevedo, Flynn, Longnecker and their two fellow plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motion to compel individual arbitration.

AMEX CARD SERVICES COMPANY, A SUBSIDIARY OF AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., A SUBSIDIARY OF AMERICAN EXPRESS COMPANY

The Board's decision can be found at https://www.nlrb.gov/case/28-CA-123865 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.